Appeals to a Higher Authority: AAO and BIA

by Turid Owren, Nadine K. Wettstein and H. Ronald Klasko

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- **AAO Jurisdiction Over Nonimmigrant and Immigrant Visa Denials, TPS, Waivers, and Other Categories**

The Administrative Appeals Office (AAO), previously called the Administrative Appeals Unit (AAU), adjudicates appeals under authority delegated to the U.S. Citizenship and Immigration Services (USCIS) by the Secretary of the Department of Homeland Security (DHS). The AAO reviews decisions made by USCIS field offices and regional service centers, including employment-based immigrant petitions under the Immigration and Nationality Act (INA) §204(b), nonimmigrant worker petitions under INA §214, other applications, and certain fine and bond matters. See link at *www.aila.org/content/default.aspx?docid=9154*, for a list of the 55 case types that may be appealed to the AAO, as well as processing times. For further discussion of the AAO's jurisdiction and regulatory authority, *see* AAO FAQs, *published* on AILA InfoNet at Doc. No. 09031862 (*posted* Mar. 18, 2009).

- **BIA Jurisdiction Over Immigration Judge Decisions and Family-Based Immigrant Petitions under INA §204(a)**

The Board of Immigration Appeals (BIA or Board) is a branch of the Executive Office for Immigration Review (EOIR), within the U.S. Department of Justice. The BIA has jurisdiction to hear appeals in three general types of cases: 1) removal proceedings (including some detention and bond appeals); 2) family-based preference petitions; and 3) waivers of inadmissibility for nonimmigrants under INA §212(d)(3). *See* 8 CFR §1003.1(b). This Practice Advisory focuses on the first two case types.

Immigration Judge Decisions. The BIA has jurisdiction to hear appeals of decisions of Immigration Judges (IJs) in removal, deportation, and exclusion proceedings (with some limitations on decisions involving voluntary departure). 8 CFR §1003.1(b)(2), (3). This includes IJ decisions pertaining to asylum, withholding of deportation, withholding of removal, Temporary Protected Status, the Convention Against Torture, and other forms of relief. The BIA also reviews IJ decisions

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on motions to reopen where the proceedings were conducted in absentia, and some decisions pertaining to bond, parole or detention.

Family-Based Preference Petitions. The BIA has jurisdiction to hear appeals of family-based immigrant petitions filed in accordance with INA §204, with the exception of petitions on behalf of certain orphans. 8 CFR §1003.1(b)(5). The Board does not have jurisdiction over employment-based petitions. 8 CFR §103.2, 103.3, 1205.2(d). The petitioner must appeal the denial of a visa petition, not the beneficiary. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985). However, self-petitioners, including battered spouses, battered children, and certain spouses of deceased citizens also may appeal. INA §§204(a)(1)(A)(ii), (iii), (iv) and 204(a)(1)(B)(ii), (iii); 8 CFR §204.2.

- **Where to File Your Appeal and What Forms to File Including Filing Fees**

Appeals to the AAO (Form I-290B, Notice of Appeal or Motion).

Appeal or Motion? Form I-290B is used to file an appeal *or* a motion. (*See* Part 2, Information about the Appeal or Motion. Depending on which box is checked, the filing may be considered by USCIS as a motion *before* forwarding the appeal to the AAO.)

When to file: Form I-290B must be filed within 30 calendar days after service of the decision. If the decision is mailed, Form I-290B must be filed within 33 days.* "Filed" means the date Form I-290B is *received*.

*Exception: If the appeal relates to revocation of an immigrant petition approval, then the appeal must be filed (received) within 15 calendar days after service of decision; 18 days if decision was mailed.

Where to File: The filing locations for Form I-290B have recently changed. *See* Form I-290B Instructions at *www.uscis.gov*. *See, e.g.*, Notices of Appeal or Motions for the following case types are filed as noted:

*A Notice of Appeal or Motion made on VAWA, T and U-related visa applications/petitions is filed with the USCIS Vermont Service Center

*A Notice of Appeal or Motion of any other decision made by a USCIS Service Center is filed with the USCIS Phoenix Lockbox facility

*A Motion to Reopen a Decision made by the USCIS under the Special Immigrant Juvenile *Perez-Olano* Agreement Settlement must be filed with the USCIS Chicago Lockbox facility

*A Motion to Reopen a Decision made by the USCIS on Forms N-470 or Form N-565 must be filed with the USCIS Field Office that made the unfavorable decision

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*A Motion to Reopen any other decision made by a USCIS Field Office must be filed with the USCIS Chicago Lockbox facility

What to File:

Form I-290B, Notice of Appeal or Motion
Form G-28, Notice of Entry of Appearance as Attorney or Representative, if applicable
Filing fee of $630, even if requesting a fee waiver (Note: Always check current filing fees on the USCIS website: *www.uscis.gov*)
Brief and/or additional evidence (to be filed with Form I-290B, unless Part 2, Box B is checked for filing an appeal, with brief and/or additional evidence to be submitted to the AAO within 30 days)

Appeals to the BIA (Form EOIR-26 *or* Form EOIR-29).

Notices of appeal from an IJ decision and visa petition decisions are filed on different forms, at different locations:

IJ Decisions (Form EOIR-26, Notice of Appeal from a Decision of an IJ).

When to file:

Form EOIR-26 must be filed within 30 calendar days after the IJ's oral decision, or within 30 calendar days after the date the IJ's written decision was mailed (if no oral decision was rendered). "Filed" means the date Form EOIR-26 is *received*.

Where to File:

File Form EOIR-26 with the BIA, as provided in the General Instructions for Form EOIR-26.

What to File:

Form EOIR-26, Notice of Appeal from a Decision of an IJ
Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative, if applicable, *even if EOIR-27 was already filed with the IJ*
Filing fee of $110, unless including a Fee Waiver Request on Form EOIR 26-A (Note: Always check current filing fees on the EOIR website: *www.justice.gov/eoir/*)
Brief and/or statement (to be filed with Form EOIR-26, unless Part 8 is checked "Yes" to filing a separate brief or statement after filing Form EOIR-26)

Visa Petition Decisions (Form EOIR-29, Notice of Appeal to the BIA from a Decision of a USCIS Officer).

When to file:

Form EOIR-29 must be filed within 30 calendar days after date of service of the decision being appealed. If the decision is mailed, Form

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EOIR-29 must be filed within 30 days. "Filed" means the date Form EOIR-29 is *received*.

Where to File: Form EOIR-29 is filed with the Department of Homeland Security (DHS) USCIS office having administrative control over the petition record. *Do not send Form EOIR-29 directly to the BIA.*

What to File:
Form EOIR-29, Notice of Appeal to the BIA from a Decision of a USCIS Officer
Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative, if applicable, *even if EOIR-27 was already filed with the USCIS*
Filing fee of $110 (Note: Always check current filing fees on the EOIR website: *www.justice.gov/eoir/*)
Brief and/or statement (to be filed with Form EOIR-29, unless BIA authorizes filing the brief directly with BIA)

- **Briefing Deadlines, Supplementing the Record, and Motion Practice**

Appeals to the AAO

Form I-290B and all required documents and fees must be received at the designated USCIS filing location within 30 days after service of the decision. An exception is if the petitioner/applicant has chosen to submit the brief and/or supplemental evidence within 30 days of filing the appeal. In such case, the after-filed brief and/or supplemental evidence must be filed directly with the AAO. If the petitioner/applicant needs more than 30 days to file the brief and/or supplemental evidence, the basis for the requested extension of time must be explained in a separate letter attached to Form I-290B at time of filing the Form I-290B. The AAO may grant additional time, but only for good cause. (Note: There is no comparable provision permitting additional time to submit a brief and/or evidence to support a *motion*. Any additional evidence in support of a motion must be submitted with Form I-290B.)

The USCIS office will review the decision and determine whether to reopen the decision on USCIS motion and issue a new (favorable) decision, *or* promptly forward the appeal and relating record of proceeding (ROP) to the AAO within 45 days. 8 CFR §103.3(a)(2)(ii-iv).

Practice Tips:

(1) When the USCIS office that denied a case transfers the case to the AAO, the attorney of record should receive a “transfer notice.” Sometimes the case may not be transferred to the AAO notwithstanding issuance of a transfer notice. And, unless the appeal included an after-filed brief or statement, the AAO will not have a record of the case. Thus, status inquiries may need to be directed to the USCIS field office or service center that rendered the denial.

(2) Given current backlogs in AAO processing times for review of certain case types (*e.g.*, I-129 H-1Bs, L-1s; I-140 Multinational Managers, Advanced Degree Professionals, and

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Skilled or Professional Workers; and I-601 Waivers—all currently at processing times of 20 months or more), a practitioner should evaluate whether to file a new petition in lieu of filing a motion to reconsider or appeal. If filing a new petition, be sure to disclose the prior filing and denial, and point to additional evidence in support of approving the new petition.

Appeals to the BIA

Removal-Related Decisions . Form EOIR-26 and all required documents and fees (or fee waiver form) must be received by the BIA on or before the 30th day (see above). Unlike a petition for review to the federal courts or appeals (see below), the reasons for filing the Notice of Appeal to the BIA must be very detailed and specific. It is not sufficient to state only that the respondent appeals from the IJ decision. The BIA may dismiss an appeal summarily if the Notice of Appeal does not sufficiently explain the basis for the appeal. 8 CFR §1003.1(d)(2). The respondent should identify the IJ errors as specifically and in as much detail as possible. For example, if the IJ excluded evidence or testimony, the Notice of Appeal should indicate what the evidence or testimony would have demonstrated and how it may have affected the outcome. If the IJ made a legal error (*e.g.,* finding the crime was an aggravated felony or involved moral turpitude), the Notice of Appeal should detail why the IJ was mistaken, including citations to authority.

Timely filing of an appeal stays most IJ removal orders. *See, generally,* 8 CFR §1003.1(b)(5). However, there is no automatic stay if the appeal is of the denial of a motion to reopen or reconsider. 8 CFR §§1003.8(b), 1103.7. The filing of a motion to reopen also does not stay removal, except a motion to reopen an in absentia removal order. 8 CFR §1003.2(f), 1003.23(b)(1)(v).

Appeals of Family-Based Visa Petitions. Form EOIR-29 and all required documents and fees must be received by the DHS on or before the 30th day (see above). Supporting briefs may be filed with DHS at the same office as the EOIR-29, in accordance with any briefing schedule set by DHS. 8 CFR §1003.3(c)(2). Requests to extend the time for filing a brief should be directed to DHS. The BIA may, in its discretion, authorize briefs to be filed directly with the BIA. 8 CFR §1003.3(c)(2).

The BIA does not consider new evidence on appeal of a visa denial. If new evidence is submitted in the course of an appeal, the submission may be deemed a motion to remand the petition to DHS for consideration of the new evidence. If the petitioner wishes to submit new evidence, the petitioner may articulate the purpose of the new evidence and explain why it was unavailable earlier. The BIA says it will not consider new evidence—or remand the petition—where the proffered evidence was expressly requested by DHS and the petitioner was given a reasonable opportunity to provide it before the petition was adjudicated by DHS. *See Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988).

- **Seeking Review in Federal District Courts and Circuit Courts of Appeal**

Following Issuance of USCIS decision*:*

A petitioner seeking to go directly to federal court and forego an administrative appeal, must meet four requirements to be exempt from the requirement that all administrative remedies be exhausted. *Darby v. Cisneros,* 509 U.S. 137 (1993). The requirements include:

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- The federal court action must be pursuant to the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237, 238; (codified at 5 USC §§551-59, 701-06, 1305, 3105, 3344, 5372, 7521). 5 USC §702 is the APA section that provides for judicial review for a party who has been "adversely affected or aggrieved" by agency action;
- There is no statute that mandates an administrative appeal. (Note: There is no statutory requirement for an AAO appeal);
- Either there is no regulation that mandates an administrative appeal or, if there is such a regulation, it does not stay the agency decision pending the administrative appeal; and
- The adverse agency decision is final for purposes of the APA. Generally, a denial of an employment-based petition is final unless an appeal has been initiated and is pending.

If these four criteria are met, there is no jurisdictional bar to the federal court accepting jurisdiction. The government may nevertheless argue that the court should dismiss the case for failure to exhaust all administrative remedies. For a detailed discussion of how to enhance the chances that a district court judge will accept jurisdiction when a petitioner wishes to forego an appeal to the AAO, *see* H. Ronald Klasko and Jennifer Hermansky, *"Federal Court Review of Denial of Employment-Based Petitions: When Exhaustion Is Not Required," Immigration Practice Pointers* (AILA 2011-12 Ed.).

Some advantages of District Court include:

- Independent decision-maker
- May be faster than most AAO appeals
- May file temporary restraining order (TRO) and/or seek injunctive relief to preserve the status quo
- EAJA fees

Following Issuance of IJ Final Removal Order*:*

All review (appeals) of final removal orders is done by the federal courts of appeals, not the district courts. See INA §242(a)(1). A person who wants to "appeal" an adverse final BIA order must file a petition for review in the court of appeals. The initial petition is a simple statement that review is sought of the specific BIA decision, which must be attached. The petition must be filed within 30 days of the date of the final removal order (not the date when the order is received) in the judicial circuit in which the IJ completed the proceedings. INA §242(b)(1), (2). That is, if the IJ completed the removal hearing and issued her decision in Chicago, the petition for review would need to be filed in the Seventh Circuit. Each circuit court has a website with detailed national and local rules, which must be followed strictly. For example, the Seventh Circuit's website is *www.ca7.uscourts.gov/*. Filing a petition for review does not automatically stay the person's removal. INA §242(b)(3)(B). The petitioner may request a stay and the court may grant it. Some circuits rarely grant stays of removal, particularly as the petitioner can pursue the petition for review even after his or her removal from the United States.

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FEDERAL COURT REVIEW OF DENIAL OF EMPLOYMENT-BASED PETITIONS: WHEN EXHAUSTION IS NOT REQUIRED

by H. Ronald Klasko and Jennifer Hermansky[*]

Your employment-based nonimmigrant or immigrant petition has been denied. You have a right to appeal to the U.S. Citizenship and Immigration Services (USCIS) Administrative Appeals Office (AAO), but you know two things. The appeal processing time will be very lengthy, and the appeal will likely be unsuccessful. Your best chance of success is in federal court. Can you go directly to federal court and forego the administrative appeal?

The answer is maybe. Although the law is undeveloped, there are arguments that the petitioner's counsel can make to significantly enhance the chances of a federal court accepting the case rather than dismissing it for failure to exhaust the administrative remedy of an AAO appeal. This practice advisory discusses how best to maximize the chances of surviving the government's motion to dismiss.

First, it is important to know the law. *Darby v. Cisneros*[1] states four requirements that must all be met in order for the petitioner to be exempt from the requirement that all administrative remedies be exhausted:

- The federal court action must be pursuant to the Administrative Procedure Act (APA).[2] 5 USC §702 is the APA section that provides for judicial review for a party who has been "adversely affected or aggrieved" by agency action;
- There is no statute that mandates an administrative appeal. In fact, there is no statutory requirement for an AAO appeal. Jurisdiction for AAO appeals is found in the regulations, which allows the AAO to hear appeals on denials or revocations of employment-based immigrant or special immigrant petitions, denials or revocations of nonimmigrant petitions, denials of waivers of inadmissibility, and denials of re-entry permits or refugee travel documents, among several other categories of appeals;
- Either there is no regulation that mandates an administrative appeal or, if there is such a regulation, it does not stay the agency decision pending the administrative appeal. This must be examined separately for each regulatory section and for each type of petition; and
- The adverse agency decision is final for purposes of the APA. Generally, a denial of an employment-based petition is final unless an appeal has been initiated and is pending.

If all of these criteria are met, there is no *jurisdictional* bar to the federal court accepting jurisdiction. The government, however, may argue that as a matter of judicial discretion, the court should dismiss the case for failure to exhaust administrative remedies. Counsel should argue that *Darby* prohibits the court from declining to accept jurisdiction if the federal court action is pursuant to the APA and there is no statutory or regulatory requirement to exhaust all administrative remedies.[3]

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[1] *Darby v. Cisneros*, 509 U.S. 137 (1993).

[2] Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237, 238; (codified at 5 USC §§551–59, 701–06, 1305, 3105, 3344, 5372, 7521).

[3] In fact, the U.S. Supreme Court in *Darby* states that, "While federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, §10(c) [of the APA], by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Id.* at 146.

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Despite the *Darby* decision, a federal court still may dismiss the case under a judicially-created and discretionarily applied concept of exhaustion of administrative remedies. Various reasons have been given for the judicially-created requirement to exhaust administrative remedies prior to seeking federal court review. At the same time, various judicially created exceptions to the requirement to exhaust administrative remedies also have been created. Petitioner's counsel would be well advised to explain to the court why the judicially-created reasons for exhaustion do not apply and why the exceptions to the requirement to exhaust do apply.

The following have been cited by various courts both inside and outside the field of immigration to justify dismissing a federal court action for failure to exhaust an administrative remedy:

- Give the agency an opportunity to correct its mistake before the federal court does so;
- Promote judicial efficiency and economy;
- Prohibit premature judicial interference with an agency's interpretive process;
- Get the benefit of an agency's practical expertise;
- Develop a factual record that will facilitate later judicial review; and
- Protect administrative agency authority in the substantive area.

All of these factors are balanced against the petitioner's interest in immediate judicial review.

So what arguments should the petitioner's counsel make to the district court judge to enhance the chances that the judge will accept jurisdiction even though the petitioner has chosen not to seek a non-mandatory AAO appeal?

Petitioner's counsel should consider making the following arguments, where applicable:

1. The factual record has been fully developed, and no evidentiary disputes remain. The only issue is a legal issue. No new evidence can be developed during the administrative appeal.
2. An administrative appeal would be futile. For example, if there is a precedent AAO decision directly on point, there is no genuine doubt regarding the result. If many AAO appeals have already decided the legal issue in other cases, the result is preordained; and the appeal is futile.
3. The AAO does not have the power to resolve the particular issue involved in the litigation. For example, if the litigation is challenging a regulation as ultra vires, the AAO does not have the power to overturn the regulation.
4. If an appeal would involve excessive delay, which would cause irreparable harm to the petitioner, exhaustion may be inappropriate. For example, an appeal involving an H-1B petition may be moot because the petition validity, and the labor condition application, may expire before an appeal is decided at the AAO. Similarly, a challenge to a Diversity Visa lottery application may be moot if not resolved by September 30. The various federal courts outside of the immigration context have found exhaustion of administrative remedies to be unnecessary where the administrative appeal involves an unreasonable or indefinite timeframe. Importantly, many AAO appeals take more than two years under current processing times.
5. If the administrative agency can be shown to be biased against the petitioner, exhaustion may be inappropriate.[4]
6. If the government has failed to comply with its own procedures, a federal court may consider accepting jurisdiction. For example, consider the Department of Labor regulation requiring that the certifying officer send a denied labor certification application to the Board of Alien Labor Certification Appeals

[4] One federal court has found that the Administrative Appeals Office (AAO) is not biased because it "is not bound by prior legacy Immigration and Naturalization Service (INS) decisions, has the power to overrule legacy INS decisions and can create binding precedent." *Mercy Catholic Medical Ctr. v. Reno*, 1994 U.S. Dist. LEXIS 17743 (EDPA 1994). However, federal courts have found other administrative agencies to be biased in decisions. *See e.g., Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156–57 (1979) (bias of Federal Trade Commission chairman), *cert. denied,* 447 U.S. 921 (1980). This is a fact specific inquiry that counsel should make based on the record before the Service. The bias argument is often coupled with the argument that the legal argument is preordained before the AAO because of precedent decisions on point.

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(BALCA) "immediately." If many months have passed and the certifying officer has still not sent the appeal to BALCA, a federal court might consider dispensing with the requirement of exhaustion of the BALCA appeal remedy.

Case law involving failure to exhaust the remedy of an AAO appeal is scarce. Referencing 8 Code of Federal Regulations (CFR) §103.4(a)(1), which states that a case "may" be certified to the AAO, the U.S. District Court for the District of Columbia held that an AAO appeal of the denial of an H-1B is not mandatory under the regulations and accepted jurisdiction.[5] Likewise, the U.S. District Court for the District of Massachusetts agreed to hear the appeal of a denial of an L-1A petition that was not appealed to the AAO following a finding that such an appeal was not mandatory.[6]

In each of these cases, the district courts analyzed the exhaustion requirement under the *Darby*[7] standard to determine if an appeal to the AAO was made mandatory either by statute or the regulations. The judicially-created and discretionarily-applied concept of exhaustion of administrative remedies was not at issue in these cases.[8] Instead, the courts focused on the language "may appeal" in 8 CFR §§103.3 and 103.4 to hold that an appeal under the agency's rules was not required. Counsel should take note that other regulations follow this same language. The regulations for H, L, O, P, R nonimmigrants all use the permissive language that denials or revocations "may" be appealed to the AAO.[9] For immigrant petition denials, the regulation at 8 CFR §204.5(n)(2) provides that denials "shall be appealable" to the AAO, thus instructing that petitioners "may" file an appeal under 8 CFR §103.3. Likewise, appeals of waivers of inadmissibility under Immigration and Nationality Act (INA) §212(h) or (i) and/or INA §212(a)(9)(B) "shall be appealable" to the AAO under 8 CFR §212.7(a)(3) and "may" be appealed under 8 CFR §103.3. Counsel should cite to all available permissive language in the complaint and when responding to a motion to dismiss to prove that an AAO appeal is not required by the agency's regulations, and therefore the court must accept jurisdiction under *Darby*.

Multiple cases also have held that the potential remedy of a motion to reopen is not a remedy that must be exhausted.[10] These courts have determined that motions to reopen are discretionary decisions and are not an "appeal of right" that can be considered an adequate administrative remedy.

If counsel will be requesting direct judicial review in a case where an administrative appeal is available but not mandatory, the authors suggest based on experience that counsel keep in mind that a federal court judge is generally not applying any of these judicially-created concepts in isolation. Especially where exhaustion may be an issue, counsel should tell a detailed story in the complaint that would help convince a federal court judge that equity is on the side of accepting jurisdiction over the case and that justice would not be done by dismissing the case.

In the end, counsel must walk a tightrope in recommending a course of action to a client and ultimately choosing whether to forego an available administrative appeal. The risks are high. Counsel will not know in advance whether the federal court judge will or will not accept jurisdiction. By the time he finds out that a judge does not accept jurisdiction, the appeal period will have expired. The client must be made to understand this risk, which must be balanced against the feasibility that an administrative appeal may accomplish the desired result. Certainly in some cases, the client may decide that, by the time the AAO gets around to

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[5] *RCM Technologies, Inc. v. U.S. Department of Homeland Security (DHS)*, 614 F. Supp. 2d 39, 45 (D.D.C. 2009). It should be noted that DHS conceded during the hearing on the motion for preliminary injunction that an appeal of an H-1B petition to the AAO is discretionary under the regulations. *Id.* at 45 ("as defendants pointed out at the motions hearing, appeals to the AAO are discretionary [under 8 CFR §103.4(a)(1)]."

[6] *Olamide Olorunniyo Ore v. Clinton*, 675 F. Supp. 2d 217, 223-24 (D.Mass 2009). *See also EG Enterprises, Inc. v. DHS*, 467 F. Supp. 2d 728, 732–33 (E.D. Mich 2006).

[7] *Darby v. Cisneros*, 509 U.S. 137 (1993).

[8] However, counsel should be prepared to argue why the judicially created reasons for exhaustion do not apply should the government raise those issues in a motion to dismiss.

[9] *See* 8 CFR §§214.2(h)(12); (*l*)(10); (o)(9); (p)(11); and (r)(17).

[10] *See*, *e.g.*, *Louis-Martin v. Ridge*, 322 F.Supp.2d 556, 558–59 (M.D.Pa. 2004); *Zhang v. Reno*, 27 F. Supp. 2d 476, 477 (S.D.N.Y. 1998).

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making a decision, the need for the beneficiary of the petition may be long gone. In those cases, and others, the risk of seeking direct federal court review may be one worth taking.

Unfortunately, it is not possible for counsel and the petitioner to hedge their bets. Once an appeal is filed and pending, there is almost no chance that a federal court will exercise jurisdiction. In such a case, counsel risks denial of the federal court action not only for reason of failure to exhaust the administrative remedy but also because the pending appeal renders the administrative decision to be a non-final order.[11]

Given the current trends of restrictive adjudications in employment-based immigrant and nonimmigrant petitions, the lengthening of the AAO appeal processing time, and the increasing number rubber of stamped denials, counsel needs to include the possibility of direct federal court review in his arsenal of possible options. However, in doing so, counsel must be aware of the risks, the likely government defenses, and how best to maximize the chances that the federal court will agree to hear the appeal. Hopefully, this practice pointer will be helpful in providing counsel with some strategies for maximizing the chances of being successful in pursuing that strategy.

[11] *See e.g.*, *Ma v. Reno*, 114 F.3d 128, 130–31 (9th Cir. 1997); *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407–08 (9th Cir. 1996).

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Additional Resources

BIA Practice Manual
http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm

Practice Advisory, How to File a Petition for Review, Legal Action Center of the American Immigration Council
http://www.legalactioncenter.org/sites/default/files/lac_pa_041706.pdf

Outline of Immigration Law and the Interpretations: Decisions of Courts in the Ninth Circuit Court of Appeals
http://www.ca9.uscourts.gov/guides/immigration_outline.php

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